Ragu a/l Konayen v Chang Boon Hin

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12A-253 OF 2011
CHEW SOO HO JC
10 JANUARY 2012

Civil Procedure — Appeal — Record appeal — Defect — Appeal against setting aside of judgment in default — Failure to include summons and pleadings in appeal record — Whether respondent estopped from raising preliminary objection for not objecting earlier — Whether O 49 r 3A of the Subordinate Courts Rules 1980 mandatory and non-compliance cannot be waived

Civil Procedure — Judgments and orders — Default judgment — Setting aside, of — Judgment in default of appearance and judgment in default on damages obtained by appellant — Respondent applying to set aside only judgment on damages — Whether respondent application defective for not seeking to set aside judgment in default of appearance — Whether respondent's application properly corrected through corrective affidavit — Whether inordinate delay in filing application to set aside — Regular judgment — Whether defence on merits shown

Civil Procedure — Service — Service of summons — Service of summons by AR registered post — AR registered card signed acknowledging receipt — Whether defendant could deny receipt of summons — Whether mere denial of receipt by defendant sufficient to disprove service

This appeal arose from the claim for damages for the injuries sustained by the appellant /plaintiff as a consequence of a road accident, against the respondent /defendant. The appellant had obtained a judgment in default of appearance on 26 August 2010 and a judgment in default on damages on 24 November 2010. The respondent subsequently applied to set aside the judgment on damages claiming that the summons had not been served on him. The respondent also produced a proposed statement of defence showing that there was merit in the defence. The learned sessions judge had set aside the default judgment and hence this appeal. The appellant contended that: (i) the respondent's application was to set aside the judgment dated 24 November 2010 whereas respondent should have applied to set aside the default judgment dated 26 August 2010; (ii) that the summons had been duly served by way of AR registered post and the AR card was returned duly acknowledged receipt with the signature of one Khoo Phaik Wah ('Khoo') whom the respondent had not denied or alleged in his affidavit that he did not know who Khoo was; and

(iii) that there was inordinate delay in the filing of the application to set aside the judgment. The respondent had also raised a preliminary objection of non-compliance with O 49 r 3A of the Subordinate Courts Rules 1980 ('SCR') on the grounds that the appellant had failed to include the summons and pleadings in the appeal record. The appellant's counsel submitted that solicitors for the respondent had earlier written to indicate that certain affidavits were not included in the appeal record which needed to be included but had never mentioned about the pleadings and hence they were estopped from raising the preliminary objection.

Held, dismissing the appeal with no order as to cost:

(1) O 49 r 3A of SCR is a mandatory provision that all relevant documents must be included in the record appeal. Parties cannot have the liberty to waive the failure to comply with such fundamental and mandatory requirement of law. If parties are allowed to do so, it will render the mandatory provision of the rules meaningless. Estoppel cannot be invoked to cover up the breach of a mandatory provision. There was no reason why the pleadings were excluded from the record. The respondent had vide its corrective affidavit sought to amend the date of the judgment sought to be set aside from 24 November 2010 – 26 August 2010 which in effect amended the notice of application from setting aside of the judgment on damages to one of setting aside the default judgment. The corrective affidavit was filed before the hearing of the application and was accepted by the sessions judge. Hence, there was no need for a separate application for the correction (see paras 7–8).

(2) In the absence of any denial or explanation as to the signatory named Khoo the service was accepted as a good service. It did not shift the onus of proof from the respondent to the appellant by the mere denial of receipt of the summons by the respondent in the presence of the AR registered card with signature acknowledging receipt unless the respondent deposed categorically that he did not know who Khoo was and that Khoo had not delivered the AR registered letter and documents to him (see para 9).

(3) The judgment in default obtained was regular and setting aside could not be *ex debito justitiae* which applies only to irregular judgment ie one which has been entered otherwise than in strict compliance with the rules or some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity (see para 9); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 referred.

(4) In relation to the inordinate delay by the respondent to file the notice of application to set aside the judgment, although the appellant may have been prejudiced as he had taken steps after the default judgment to

proceed to assessment of damages, this prejudice could certainly be met by an appropriate order of costs. No question of oppression arose. Long delay could not be the basis for rejecting the application in the circumstances of this case (see para 11); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 referred.

(5) For a regular default judgment to be set aside the principle expounded in *Evans v Bartlam* [1937] AC 473 has been adopted by our courts in that the applicant must show a defence which has some merits that the court ought to try (see para 12); *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 referred.

(6) In the respondent's affidavit a 'Cadangan Pembelaan' was exhibited where, inter alia, the respondent denied the allegations contained in the statement of claim as well as the particulars of negligence as pleaded. Since the statement of claim and summons was not enclosed in the appeal record, the court had no opportunity to be appraised of what was contained in the statement of claim in particular to ascertain whether the proposed defence was or otherwise a sham defence. This benefit of doubt must therefore be resolved in favour of the respondent that the proposed defence was not a sham defence. Hence, there was no reason to find that there was no merit in the defence or that there was no arguable or triable issue. Hence the setting aside of the default judgment was proper and right in law (see para 14).

[Bahasa Malaysia summary

Rayuan ini timbul daripada tuntutan ganti rugi bagi kecederaan yang dialami oleh perayu/plaintif akibat kemalangan jalan raya, terhadap responden/defendan. Perayu telah memperoleh penghakiman ingkar kehadiran pada 26 Ogos 2010 dan penghakiman ingkar bagi ganti rugi pada 24 November 2010. Responden kemudiannya memohon untuk mengetepikan penghakiman ganti rugi dengan menghujahkan bahawa saman tersebut telah tidak disampaikan kepadanya. Responden juga mengemukakan penyataan pembelaan yang dicadangkan yang menunjukkan bahawa terdapat merit dalam pembelaan. Hakim mahkamah sesyen telah mengetepikan penghakiman ingkar tersebut dan dengan itu, rayuan ini. Perayu menghujahkan bahawa: (i) permohonan responden adalah untuk mengetepikan penghakiman bertarikh 24 November 2010 sedangkan responden sepatutnya memohon untuk mengetepikan penghakiman ingkar bertarikh 26 Ogos 2010; (ii) bahawa saman tersebut telah disampaikan dengan wajar melalui pos berdaftar AR dan kad AR tersebut telah dikembalikan dengan pengesahan penerimaan berserta tandatangan seorang yang bernama Khoo Phaik Wah ('Khoo') yang tidak dinafikan atau didakwa oleh responden bahawa dia tidak tahu siapa Khoo; dan (iii) bahawa terdapat kelewatan melampau dalam memfailkan permohonan untuk mengetepikan penghakiman tersebut. Responden juga telah membangkitkan bantahan awal

terhadap ketidakpatuhan A 49 k 3A Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') atas alasan bahawa perayu telah gagal untuk menyertakan saman dan pliding-pliding dalam rekod rayuan. Peguam perayu menghujahkan bahawa peguam bagi responden telah menulis untuk menunjukkan bahawa afidavit-afidavit tertentu yang perlu dikepilkan telah tidak disertakan dalam rekod rayuan tetapi tidak pernah menyatakan mengenai pliding-pliding dan dengan itu mereka telah diestop daripada membangkitkan bantahan awal.

Diputuskan, menolak rayuan tanpa perintah terhadap kos:

(1) Aturan 49 k 3A KMR merupakan peruntukan mandatori bahawa kesemua dokumen-dokumen material hendaklah disertakan dalam rekod rayuan. Pihak-pihak tidak boleh mempunyai kebebasan untuk mengetepikan kegagalan untuk mematuhi kehendak asas dan wajib undang-undang. Jika pihak-pihak dibenarkan untuk berbuat demikian, ia akan menyebabkan peruntukan mandatori peraturan menjadi tidak berguna. Estopel tidak boleh disalahgunakan untuk menutup pelanggaran peruntukan mandatori. Tiada sebab mengapa pliding dikeluarkan dari rekod. Responden telah, melalui afidavit pembetulan, berusaha untuk meminda tarikh penghakiman yang diminta untuk diketepikan daripada 24 November 2010 – 26 Ogos 2010 yang berkuat kuasa meminda notis permohonan daripada mengetepikan penghakiman atas ganti rugi kepada pengenepian penghakiman ingkar. Afidavit pembetulan telah difailkan sebelum perbicaraan permohonan tersebut dan telah diterima oleh hakim mahkamah sesyen. Oleh itu, tiada keperluan untuk permohonan berasingan bagi pembetulan tersebut (lihat perenggan 7–8).

(2) Tanpa penafian atau penjelasan mengenai penandatangan bernama Khoo, penyampaian tersebut diterima sebagai penyampaian yang baik. Ia tidak mengalihkan beban pembuktian daripada responden kepada perayu semata-mata melalui penafian penerimaan oleh responden dengan adanya kad AR berdaftar bertandatangan mengakui penerimaan kecuali responden memberikan keterangan secara mutlak bahawa dia tidak mengenali Khoo dan bahawa Khoo tidak menyampaikan surat berdaftar AR dan dokumen-dokumen kepadanya (lihat perenggan 9).

(3) Penghakiman ingkar yang diperolehi adalah mengikut aturan dan pengenepian tidak boleh menjadi *ex debito justitiae* yang hanya terpakai kepada penghakiman yang tidak teratur yang mana telah dibuat selain pematuhan ketat peraturan atau beberapa undang-undang, atau dimasukkan kerana beberapa perkara tidak tepat yang dianggap begitu serius hingga menjadikan sesuatu prosiding itu batal (lihat perenggan 9); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 dirujuk.

(4) Berhubung kelewatan melampau oleh responden untuk memfailkan

notis permohonan untuk mengetepikan penghakiman tersebut, walaupun perayu mungkin telah diprejudis kerana dia telah mengambil langkah-langkah selepas penghakiman ingkar untuk meneruskan penilaian ganti rugi, prejudis ini tentunya boleh dipenuhi oleh suatu perintah dengan kos yang sesuai. Persoalan penindasan tidak timbul. Kelewatan melampau tidak boleh menjadi asas untuk menolak permohonan dalam hal keadaan kes ini (lihat perenggan 11); *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 dirujuk.

(5) Untuk mengetepikan penghakiman ingkar, prinsip yang dijelaskan dalam *Evans v Bartlam* [1937] AC 473 telah diterima pakai oleh mahkamah-mahkamah di mana pemohon mesti menunjukkan suatu pembelaan yang mempunyai beberapa merit bahawa mahkamah patut bicarakan (lihat perenggan 12); *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312 dirujuk.

(6) Dalam afidavit responden, suatu 'Cadangan Pembelaan' dilampirkan di mana, antara lain, responden menafikan dakwaan yang terkandung dalam pernyataan tuntutan serta butir-butir kecuaian yang diplidkan. Oleh kerana pernyataan tuntutan dan saman itu tidak disertakan dalam rekod rayuan, mahkamah tidak mempunyai peluang untuk menilai apa yang terkandung dalam pernyataan tuntutan khasnya untuk menentukan sama ada pembelaan yang dicadangkan adalah pembelaan palsu. Manfaat keraguan ini mestilah diputuskan memihak kepada responden bahawa pembelaan yang dicadangkan bukan suatu pembelaan palsu. Oleh itu, tiada sebab untuk memutuskan bahawa tiada merit dalam pembelaan atau bahawa tiada isu yang diperdebatkan atau dibicarakan. Oleh itu pengenepian penghakiman ingkar adalah betul dan tepat di sisi undang-undang (lihat perenggan 14).]

Notes

For a case on service of summons, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 7469.

For cases on default judgment, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 4843–4846.

For cases on record of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1592–1656.

Cases referred to

Evans v Bartlam [1937] AC 473, HL (folld)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312, SC (refd)

Tuan Hj Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)

Legislation referred to

Subordinate Courts Rules 1980 O 49 r 3A

Baldev (Syarikat Baldev Bhar) for the appellant.
Parimala (Subramaniam Shanmugam & Associates) for the respondent.

Chew Soo Ho JC:

DECISION

INTRODUCTION

[1] This appeal arose from the claim for damages for the injuries sustained by the appellant/plaintiff as a consequence of a road accident, against the respondent/defendant wherein a default judgment of appearance dated 26 August 2010 and a judgment on damages dated 24 November 2010 had been entered in favour of the appellant/plaintiff. However, upon an application by the respondent to set aside the judgment on damages, the learned sessions judge had set aside the default judgment. Hence, appellant appealed.

THE ISSUES ON APPEAL

[2] The appellant had raised three issues in this appeal. Firstly, the respondent's application was to set aside the judgment on damages dated 24 November 2010 whereas the respondent should have applied to set aside the default judgment dated 26 August 2010 which if the respondent were to succeed, it would have automatically rendered the subsequent judgment dated 24 November 2010 ineffective. The second issue is on the service of the summons on the respondent who contended that he did not receive it; the appellant had shown that service was duly carried out and the AR registered card was returned duly acknowledged receipt with the signature of one Khoo Phaik Wah whom the respondent had not denied or alleged in his affidavit that he did not know who Khoo Phaik Wah was. The respondent, in short, did not challenge the signatory. Service must thus be accepted as proper. Thirdly, the appellant contended that there was inordinate delay in the filing of the application to set aside the judgment although the appelant had all along kept the insurance company of the respondent's vehicle informed of all the proceedings and dates, which they had not challenged. The application to set aside only came about when the order of the assessment of damages had been served.

THE RESPONDENT'S PRELIMINARY OBJECTION AND ADDITIONAL ISSUE

[3] The respondent in the oral submission in reply to the additional oral

submission to emphasise on points raised by the appelant in the written submission had canvassed a preliminary objection of non-compliance with O 49 r 3A of the Subordinate Courts Rules ('SCR') 1980. In addition, the respondent also raised the issue that the respondent had annexed in the affidavit in support of the application to set aside the judgment a proposed statement of defence (additional appeal record pp 7–9) which showed, as he contended, that there is merit in the defence.

[4] I shall therefore determine on these issues raised and submitted by both parties.

FINDINGS

[5] I consider the preliminary objection by the respondent under O 49 r 3A of the SCR as the first issue.

[6] The complaint by the respondent is that the appelant had failed to include the summons and pleadings of the appelant/plaintiff in the appeal record thereby contravenes O 49 r 3A of the SCR which is a mandatory provision. Hence, it is argued that this appeal cannot be maintained. The appellant conversely submitted that no notice has been given of this preliminary objection. Learned counsel for the appelant submitted that solicitors for the respondent had earlier written to indicate that certain affidavits were not included in the appeal record which needed to be included but had never mentioned about the pleadings. He submitted that learned counsel for the respondent must be taken to have agreed not be object to the non-inclusion of the pleadings in the appeal record. Indirectly he is submitting that estoppel should apply.

[7] Order 49 r 3A of the SCR is a mandatory provision that all relevant documents including the pleadings of the case, notes of evidence, grounds of judgment, decision, notice of appeal and all documentary exhibits and relevant documents are specifically provided that they must be included in the appeal record. I do not agree that parties can have the liberty to waive the failure to comply with such fundamental and mandatory requirement of law. If parties are allowed to do so, it will render the mandatory provision of the rules meaningless. I do not think that estoppel can be invoked to cover up the breach of a mandatory provision. There is no reason why the pleadings were excluded from the record. As to whether the non-inclusion of the pleadings in the record of appeal will affect this appeal or otherwise, it will be discussed below when this court deals with the proposed defence of the respondent.

[8] On the issue of the respondent's notice of application to set aside the judgment on assessment of damages dated 24 November 2010 instead of the

default judgment dated 26 August 2010, the respondent submitted that it had vide its affidavit of correction at pp 52–53 of the appeal record through the deponent deposed to amend and correct the error in the application the judgment date from 24 November 2010–26 August 2010 which had in effect amended the notice of application from setting aside of the judgment on damages to one of setting aside the default judgment. It is apparent that the corrective affidavit was filed before the hearing of the application and it was accepted by the learned sessions judge. I would agree that it is ideal to have a separate application even orally to be made to amend the date in the application. However, looking at the corrective affidavit which serves the purpose and is in effect to amend the same date, I see no difference for a separate application to be filed or made for that correction unless the said corrective affidavit was rejected by the court hearing the application. Since it was admitted, to make an additional application or oral application to amend becomes redundant.

[9] On the issue of service, I agree with the submission by the appelant that in the absence of any denial or explanation as to the signatory named Khoo Phaik Wah who signed to acknowledge receipt of the summons for and on behalf of the respondent in the AR registered card, it ought to be accepted as a good service. I find that it does not shift the onus of proof from the respondent to the appelant by the mere denial of receipt of the summons by the respondent in the presence of the AR registered card with signature acknowledging receipt unless the respondent deposed categorically that he did not know who Khoo Phaik Wah was and that Khoo Phaik Wah had not delivered the AR registered letter and documents to him. This is elementary. I accept therefore that the service must be deemed proper. In the circumstances, the judgment in default obtained is regular and setting aside cannot be *ex debito justitiae* which applies only to irregular judgment ie one which has been entered otherwise than in strict compliance with the rules or some statute, or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (FC).

[10] The appelant's further ground raised is the inordinate delay by the respondent to file the notice of application to set aside the judgment. In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd*, the Federal Court held that to set aside a judgment which has not been regularly obtained which entitled the party to set aside *ex debito justitiae*, the application to set aside should be made with reasonable promptitude, inter alia. However, the Federal Court held further as follows:

Held: …

(5) It is clear law that the court retains a discretion to set aside an irregular judgment despite long delay, provided it is satisfied that: (1) no one has suffered prejudice by reason of the appellant's delay, (ii) alternatively, where such prejudice has been sustained, it can be met by an appropriate order as to costs; or (iii) to let the judgment to stand would constitute an oppression.

[11] In the circumstances of this case, I am inclined to find that although the appelant may have been prejudiced as he had taken step after the default judgment to proceed to assessment of damages and obtain a judgment dated 24 November 2010, this prejudice can certainly be met by an appropriate order of costs. I do not find any question of oppression to arise. Long delay therefore may not be the basic for rejecting the application in the circumstances of this case.

[12] For a regular default judgment to be set aside the principle expounded in *Evans v Bartlam* [1937] AC 473 has been adopted by our court in that the applicant must show a defence which has some merits that the court ought to try. Lord Atkin said at p 480:

The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure.

[13] In *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312, our Supreme Court has succinctly recapitulated the principle laid down in *Evans v Bartlam* at p 321 as follows:

Lord Atkin was of the view that it was sufficient for the defendant to file an affidavit on merits, meaning that the applicant must produce to the court evidence that he had a prima facie defence (see p 480). Lord Wright, on the other hand, at p 489, was of the view that the primary consideration was whether the defendant had merits to which the court should pay heed, and, if the merits were shown, the court would not, prima facie, desire to let a judgment pass, on which there had been no proper adjudication. If the defendant showed merits, then he clearly showed an issue which the court should try. Lord Russell of Killowen, on his part, reminded the courts not to fail to consider whether any useful purpose could be served by setting aside the judgment and that obviously, no useful purpose would be served if there were no possible defence to the action. In other words, the standard laid down by Lord Russell is not that much lower and that it is sufficient if the defendant can show he has a possible serious defence.

Indeed, this court has had occasion to consider the question whether a judgment in default should be set aside under O 13 r 8 and did in fact approve and followed Lord Atkin's dictum. Thus, in *Fira Development Sdn Bhd v Goldwin Sdn Bhd*, Lee Hun Hoe CJ (Borneo) (as he then was) held that a defence on the merits meant merely raising only an arguable or triable issue, not unlike any O 14 cases and that

A a judgment in default was not a judgment on the merits. In other words, it was decided in that case that a judgment in default may be set aside if the facts show a defence has merits. *Fira*'s case was followed by Zakaria Yatim J in *PL Construction Sdn Bhd v Abdullah bin Said*. Again, VC George J in *East Asiatic Co (M) Bhd v Kamanis Sdn Bhd* used such expression as 'bona fide reasonable defence' to describe B the standard of the defence that must be met for the applicant to succeed in setting aside a default judgment, although he cited no authority for his proposition, and it seemed to us the proposition was redolent of Lord Atkin's dictum. Consistent with the decision of our own courts in the past in dealing with issues such as those under O 13 r 8 and O 19 r 9, the guidelines in *Evans v Bartlam* should be accepted. In our C view, in order to succeed in his application under these orders, the applicant must show that he has a defence which has some merits and which the court should try. To use common and plain language, the applicant must show that his defence is not a sham defence but one that is prima facie, raising serious issues as a bona fide reasonable defence that ought to be tried because obviously if the defence is a sham D defence, there is no defence and the application must fail. It need hardly be emphasised.

[14] In the respondent's affidavit at pp 1–3 of the additional record appeal, a 'cadangan pembelaan' was exhibited as 'CBH2' (pp 7–9 of the additional E record appeal) where, inter alia, the respondent denies the allegations as contained in paras 4(a)–4(b) of the statement of claim as well as the particulars of negligence as pleaded and put the appelant/plaintiff to strict proof. The respondent further denies that the accident was caused as alleged in the statement of claim or that it was resulted solely by the negligence of the F respondent; further and in the alternative, the respondent pleads contributory negligence with the particulars of negligence against the appelant. The statement of claim and summons as stated earlier was not enclosed in the record appeal. This court is thus not given the opportunity to be appraised of what is contained in the statement of claim in particular to ascertain whether the G proposed defence is or otherwise a sham defence. This benefit of doubt must therefore be resolved in favour of the respondent that the proposed defence is not a sham defence. Be that as it may, how an accident occurred can be subjective to the parties involved and it is upon a full hearing that the court will be able to determine the liability of the parties. Contributory negligence is H often pleaded and can be a valid defence in the apportionment of liability and damages after a trial by the court. In the circumstances. I have no reason to find that there is no merit in the defence or that there is no arguable or triable issue or that it was not bona fide since liability and quantum which are the fundamental triable issues in a traffic accident claim, are raised in the proposed I defence. On this ground alone, the setting aside of the default judgment which in effect has also set aside the assessment of damages by the learned sessions judge is proper and right in law.

[15] For the foregoing reason, I do not intend to disturb the order of the

learned sessions judge in setting aside the default judgment. This appeal is therefore dismissed. As to question of costs for this appeal, I do not propose to penalise the appelant with costs in the circumstances of this case. No cost for this appeal is therefore ordered.

Appeal dismissed with no order as to costs.

Reported by Kanesh Sundrum